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In The

Supreme Court of the United States

LINDA L. VAUGHEY,
Commissioner of Political Practices,

Petitioner,

v.

MONTANA CHAMBER OF COMMERCE, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I. I-125 IS JUSTIFIED BY THE "NEW" TYPE OF CORRUPTION IDENTIFIED BY THIS COURT IN *AUSTIN*.

The Respondents' brief reveals their failure to appreciate the import of this Court's decision in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), where the Court recognized a new type of corruption, the "corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." *Austin*, 494 U.S. at 660. The Court went well beyond the traditional concept of political corruption, noting that it was **not necessary** to address whether Michigan's restriction on the use of corporate treasury funds was supported by the state's interest in preventing quid pro quo corruption. *Austin*, 494 U.S. at 659-60. In *Austin* and *FEC v. Massachusetts Citizens for Life* (*MCFL*), 479 U.S. 238 (1986), this Court recognized that state laws permit corporations to accumulate vast amounts of capital, and this corporate wealth can be used improperly to skew political debate. Thus, states have a compelling interest in ensuring that the wealth accumulated by corporations in the economic marketplace with the help of the corporate form may not be used by corporations to obtain "an unfair advantage in the political marketplace." *Austin*, 494 U.S. at 659-60; *MCFL*, 479 U.S. at 257-58.

The Respondents' argument that the *Austin* decision is limited in its application to candidate campaigns is not supported by a logical reading of the case. Nothing in

Austin suggests that its rationale for regulating corporate spending is limited to candidate elections. Although *Austin* involved independent expenditures in candidate campaigns, the type of corruption addressed by the Court relates to the political process generally. The Court, in fact, referred to it as a "different type of corruption in the *political arena*. . . . " *Austin*, 494 U.S. at 660 (emphasis added). This Court also emphasized that states have an interest in ensuring that the state-created advantages enjoyed by corporations not be used by corporations to obtain "an unfair advantage in the **political marketplace**." *MCFL*, 479 U.S. at 257-58; *Austin*, 494 U.S. at 659-60 (emphasis added). The use of these terms by this Court suggests application beyond candidate elections.

As pointed out in Petitioner's opening brief, a number of commentators have recognized that the rationale of *Austin* and *MCFL* would permit states to require the use of separate, segregated funds for corporate expenditures in ballot issue campaigns, as well as for independent expenditures related to candidates. This is because the type of corruption discussed in *Austin* and *MCFL* is based on the **source** of the money, as explained by one of the commentators cited in the Petitioner's opening brief:

> The key difference between [the quid pro quo corruption discussed in *Buckley v. Valeo*, 424 U.S. 1 (1976)] and *Austin* corruption is that the former turns on the impact of funds on candidates, while the latter focuses on the source of the funds used for electoral purposes. Because corporate expenditures on ballot measures financed through general treasury funds are tainted in

> just the same way as candidate-oriented expenditures, under *Austin*'s conception of corruption both should be treated as evils the state has a valid interest in preventing.

Adam Winkler, *Beyond Bellotti*, 32 Loy. L.A. L. Rev. 133, 174 (1998).

As the evidence presented at trial reveals, Montana's historical experience with massive corporate spending on ballot issues vividly demonstrates the need to regulate such spending by controlling the source of the money used by corporations in the political arena. Corporate money was the dominant and overwhelming factor in the defeat of at least four Montana ballot issues: I-87, known as the Montana "bottle bill"; I-113, the second Montana bottle bill proposed eight years later; I-115, which would have increased state taxes on tobacco products to fund health programs and reduce smoking; and I-122, Montana's "clean water" initiative. (Tr. at 103-04, 556-57, 638-41, 1019-20; Exs. 505, 506, 508, 532, 545, 801.)

Testimony at trial also underscores the disillusionment experienced by Montana citizens who had devoted their time and energies to several ballot issue campaigns, only to have corporate spending drown out their voices and the efforts of citizen supporters of the ballot issues. For example, Dr. Robert Shepard, a Helena, Montana physician, took an unpaid leave of absence from his practice to work in support of I-115, the tobacco initiative. While the proponents of the initiative raised $44,000, the opposition, funded by nearly $1.6 million in contributions from out-of-state tobacco companies and trade organizations, outspent the proponents by a ratio of 36 to 1. Dr. Shepard's testimony revealed his discouragement:

> I haven't been on another initiative since then, even though there have been a few that I've supported with dollars and a few that I've supported intellectually, at least. I came away from that initiative with a really sour taste in my mouth. The process clearly doesn't work. One immensely wealthy corporation has the opportunity to come in and pay as much money as it needs to pay to influence the voters the way it wants to influence the voters.

(Tr. at 540.)

II. CASES CITED BY THE RESPONDENTS THAT WERE DECIDED PRIOR TO *AUSTIN* DO NOT ADDRESS THE NEW TYPE OF CORRUPTION THAT CAN RESULT FROM THE ACCUMULATION OF CORPORATE WEALTH AND THE STATUTES CONSIDERED IN THOSE CASES ARE DISTINGUISHABLE FROM I-125.

Dismissing the significance of the *Austin* decision, the Respondents' brief instead relies primarily on *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981), and *C & C Plywood Corp. v. Hanson*, 420 F. Supp. 1254 (D. Mont. 1976), *aff'd*, 583 F.2d 421 (9th Cir. 1978). *Bellotti*, *Citizens Against Rent Control*, and *C & C Plywood*, as well as all of the other cases cited on pages 2-4 of the Respondents' brief, were decided prior to this Court's decisions in *MCFL* and *Austin*. All of those decisions, therefore, must be examined and analyzed in the context of the Court's later rulings in *MCFL* and *Austin*, wherein the Court recognized the new form of corruption discussed above.

It is also important to bear in mind that the statutes at issue in those older cases are all distinguishable from I-125. The statute struck down by the Ninth Circuit Court in *C & C Plywood* imposed an absolute ban on corporate spending on ballot issues. I-125 permits corporations to raise and expend money through separate, segregated funds. Thus, *C & C Plywood* has no application to the issues in this case.

The statute at issue in *Bellotti* prohibited corporations from making contributions or expenditures in connection with ballot issues, except on questions that materially affected the property, business, or assets of the corporation. The statute also provided that no ballot issue affecting taxation of the income, property, or transactions of individuals would be deemed to materially affect the corporation. *Bellotti*, 435 U.S. at 768. Like the statute considered in *C & C Plywood*, there was no provision permitting corporate expenditures through separate, segregated funds. In *MCFL*, this Court noted that the regulation of campaign financing with the permissible use of a separate, segregated fund "is of course distinguishable from the complete foreclosure of any opportunity for political speech that we invalidated in the state referendum context in [*Bellotti*]." *MCFL*, 479 U.S. at 259 n.12.

The ordinance considered by this Court in *Citizens Against Rent Control* limited all contributions to ballot issue committees to $250, regardless of the source. The restrictions of the ordinance applied to "persons," not specifically to corporations and, like the statutes examined in *Bellotti* and *C & C Plywood*, included no provisions permitting spending through separate, segregated funds. In contrast, I-125 requires non-exempt corporations to

make contributions through separate, segregated funds with no monetary limit on the amount of such contributions.

Contrary to Respondents' arguments, I-125 did not "silence" corporations, nor was it designed to "equalize" the ability of individuals or non-corporate entities to participate in the electoral process. Rather, its purpose was to regulate the **source** of the funds used by corporations to influence ballot issues by requiring that such spending come from segregated funds. I-125, in fact, permits corporations to spend **unlimited** amounts in support of, or opposition to, ballot issues, as long as the funds are contributed by shareholders, employees, or members of the corporation, including officers. This ensures that the money spent by corporations was intended by those who contributed it to be used for political purposes:

> By requiring that corporate independent expenditures be financed through a political committee expressly established to engage in campaign spending, § 441b seeks to prevent this threat to the political marketplace. The resources available to *this* fund, as opposed to the corporate treasury, in fact reflect popular support for the political positions of the committee. . . . The expenditure restrictions of § 441b are thus meant to ensure that competition among actors in the political arena is truly competition among ideas.

MCFL, 479 U.S. at 258-59.

The Respondents' claim that a separate fund is "not an adequate or meaningful alternative" rings hollow given the failure of most of the corporations involved in

this litigation to even establish and utilize the separate, segregated fund mechanism authorized by I-125. Moreover, the trial testimony reveals that those few corporations who did establish segregated funds for ballot issue campaign purposes had considerable success, particularly in view of the fact that 1998 was the first election year in which I-125 was in effect. (Tr. at 63, 76-77, 190, 192, 202.)

III. THE POST-*AUSTIN* CASES CITED BY THE RESPONDENTS ARE NOT RELEVANT.

The more recent cases cited by the Respondents on page 5 of their brief have no bearing on this case. *McIntyre v. Ohio Election Comm'n*, 514 U.S. 334 (1995) involved consideration of an Ohio statute that prohibited anonymous writings supporting or opposing candidates or ballot issues. The Colorado statute before the Court in *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999) placed certain restrictions on initiative petition circulators and established disclosure requirements for proponents of initiatives. Thus, neither case involved laws governing corporate spending on ballot issues. And, in each case, this Court cited *Bellotti* for the proposition that ballot issues do not pose a danger of quid pro quo corruption. Neither case discussed the "new" type of corruption addressed by the Court in *Austin*; therefore, neither case has any relevance to the issue presented by this petition.

IV. THE DISTRICT COURT'S FINDINGS, ON WHICH RESPONDENTS RELY, REFLECT THAT COURT'S MISUNDERSTANDING OF THE GOVERNING LEGAL PRINCIPLES.

Like the district court, the Respondents challenge the adequacy of the evidence presented by the Petitioner and Intervenor on the question of whether the use of corporate money dominated ballot issue campaigns in Montana. However, the district court's conclusion was fundamentally flawed because it based its ruling on the traditional quid pro quo form of corruption that can arise in candidate campaigns, rather than the new form of corruption discussed by this Court in *MCFL* and *Austin*. In any case, under the *Austin* standard, there is no requirement that a state make such an empirical showing. Rather, this Court in *Austin* focused on the **potential** for distortion of the political process through the use of the corporate form. *Austin*, 494 U.S. at 661. Thus, it is **apparent** corruption, rather than **actual** corruption, that forms the primary basis for the restrictions of I-125. Such efforts to regulate corporate speech are matters of legislative judgment that are entitled to "considerable deference" by the courts. *MCFL*, 479 U.S. at 258 n.11; *see Austin*, 494 U.S. at 661.

V. THIS ISSUE IS TIMELY AND OF EXCEPTIONAL IMPORTANCE.

Demonstrably valid concerns regarding the ability of corporations to dominate and distort the political process

led Montana voters to adopt I-125. Contrary to the assertions of the Respondents, I-125 does not deny corporations the right to speak, nor does it deny the electorate the right to hear differing viewpoints on ballot issues. I-125's segregated fund requirement for corporate speech is justified by "the unique state-conferred corporate structure that facilitates the amassing of large treasuries" and "ensures that [corporate] expenditures reflect actual public support for the political ideas espoused by corporations." *Austin*, 494 U.S. at 660.

The Court should take the opportunity to review this important issue now. This Court's recent decisions in *FEC v. Colorado Republican Federal Campaign Comm.*, ___ U.S. ___ (slip op. June 25, 2001) and *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377 (2000), reveal considerable disagreement regarding the extent of authority of the federal government and states to regulate campaign spending. The district court in this case has invalidated a statute adopted by popular vote of the people of the state of Montana, thereby prohibiting Montana from enforcing a law designed to address precisely the type of corruption identified by this Court in *Austin*. Campaign finance bills in Congress demonstrate the ongoing importance of the issue and this case presents a timely opportunity for the Court to provide guidance regarding the relationship between the legal principles announced in *Austin*, *MCFL*, *Bellotti*, and the more recent decisions addressing regulation of campaign financing.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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